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CASE NO. 84–918

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In The Supreme Court of the United States

OCTOBER TERM, 1984

THE UNION CENTRAL LIFE INSURANCE COMPANY,

Appellant,

v.

JOANNE LIMBACH, TAX COMMISSIONER OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the appeal presents a substantial federal question or one that could not be resolved adequately on a nonfederal basis.

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STATEMENT OF CASE

This case originated in the Ohio Board of Tax Appeals as the result of an appeal by the Union Central Life Insurance Company (also referred to as UCL) from a final order affirming a sales and use tax assessment. The bulk of the assessment was on payments to the Electronic Data Services Corporation (EDS). In rejecting the appellant's objections to the assessment, the Tax Commissioner had found that the ultimate object of the transaction was to obtain processed data for use in Ohio, and that such property was in fact received and used in Ohio so as to be subject to the use tax. The appeal to the Board of Tax Appeals disputed this determination.

At the Board an evidentiary hearing was held and briefs were filed by the parties. The record revealed that the appellant is a mutual life insurance company organized in 1867. Since 1969 the appellant has had a contract with EDS for what it calls "facilities management." Facilities management was a concept in which a data-processing company assumes responsibility for a broad range of the data-processing needed by a company. The effort by EDS in this regard occurred in three stages. First, it defined the needs of the appellant as a customer. This often included advising the appellant as to the capabilities of its systems. The second stage was the actual design of systems or programs to meet the appellant's needs. The third stage was operational and included the installation, maintenance and possible modification of systems.

The EDS computer is located in Dallas, Texas. Video screen terminals, hard-copy terminals, and high-speed printers were placed in the appellant's facilities in

Forest Park, Ohio, and were hooked up to the computer via telephone lines. Employees of EDS maintain this equipment and actually operate the high-speed printers. The appellant has no employees in Dallas, and its only contact with EDS is in Forest Park, Ohio. Processed data is received by the appellant either as print-out on the video screen terminals or as print-outs from the hard-copiers and the high-speed printers, all located in Forest Park. These machines are used to print information letters for policy-holders and also premium bills.

On October 4, 1983, the Board issued a Decision and Order in which it affirmed the assessment. In doing so the Board found that the transactions in question were for data-processing with the true object being the hard-copy print-outs and video print-outs that were the product of such processing. The Board also found that such print-outs were received and used by the appellant in Ohio and were, therefore, properly the subject of the use tax.

Thereafter, on October 28, 1983, UCL filed a notice of appeal to the Ohio Supreme Court. Pursuant to the rules of that court the matter was briefed and oral arguments were heard. On July 11, 1984, the Ohio court issued an opinion and decision in which it affirmed the assessment of use tax on the base charge paid by the appellant. The appellant subsequently filed a Motion for Reconsideration, but it was denied on September 13, 1984.

On October 29, 1984, the appellant filed with the Ohio Supreme Court a notice of appeal to the United States Supreme Court. The appeal was docketed in the United States Supreme Court on December 7, 1984. The appellant has also served its jurisdictional statement

on the appellee. It was received by the appellee on December 10, 1984. The appellee now files this Motion to Dismiss or Affirm for the reason that the appellant has failed to set forth a substantial federal question and the judgment rests on an adequate nonfederal basis.

ARGUMENT

I. THIS APPEAL DOES NOT INVOLVE A SUBSTANTIAL FEDERAL QUESTION, BUT RATHER A DISPUTE AS TO THE FACTUAL AND LEGAL CHARACTER OF THE ASSESSMENT AND THE TRANSACTION TO WHICH IT RELATES. SUCH DISPUTE HAS ALREADY BEEN DECIDED ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

The appellant has based its claim of jurisdiction on its contention that the Ohio court has upheld an assessment on an interstate activity in violation of the commerce clause of the United States Constitution. The appellant asserts that the Ohio court applied an overly broad definition of intrastate commerce in affirming the assessment, and it characterizes the issues it raises as not having been previously addressed in the context of computer technologies. Thus, it reasons that the case is a proper one for review by this Court. For the reasons that follow the appellee submits that this appeal does not present a substantial federal question, but rather a dispute as to the factual and legal character of the assessed transactions, a dispute which can and has been resolved by reference to state law, consistent with the federal law.

Initially, it should be noted that data-processing transactions such as the one in issue have been held to constitute sales of the processed data under Ohio law. Compare *Accountant's Computer Services v. Kosydar* (1973), 35 Ohio St. 2d 120, 298 N.E. 2d 519; *Financial Computer Services, Inc. v. Lindley* (1982), 70 Ohio St. 2d 243, 436 N.E. 2d 1025. In the instant case it was undisputed that the assessed base charge was for what the appellant itself termed "facilities management," an arrangement by which EDS undertook a wide range of activities including the development of programs and the maintenance and operation of a computer to actually perform the data-processing needed by the appellant. EDS also installed and maintained various terminals in the appellant's Ohio office to enable the appellant's employees to request and obtain the results of such processing as needed. It was, therefore, both reasonable and lawful for the Board of Tax Appeals to determine that the true object of the appellant in the assessed transactions was the receipt..and use in Ohio of the processed data, and that such use was subject to assessment under R.C. 5741.02.

Likewise, the assessment was consistent with federal law and did not violate the commerce clause as an assessment on an interstate activity. In this regard it may be pointed out that the commerce clause itself is found in Article I, Section 8, Clause 3, Constitution of the United States, and reserves to Congress the power to regulate commerce "among the several States." In considering the effect of this clause the United States Supreme Court has asked whether a state tax burdens interstate commerce by placing it at a disadvantage as compared to or in competition with intrastate commerce. *McGoldrick v. Berwind–White Coal Mining Co.,* 309 U.S. 33 (1940);

Northwestern States Portland Cement Co. v. State of Minn., 358 U.S. 450 (1959). Where there is no such discrimination it has been recognized that the power of a state to tax is not inconsistent with the powers of Congress under this clause. *General Motors Corp. v. Washington,* 377 U.S. 436 (1964); *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937); *Drown v. U.S.,* 198 F. 2d 999 (C.A. Cal. 1952), *cert. den.* 344 U.S. 920 (1953); *Washington–Oregon Shippers Co–op Ass'n. v. Schumacher,* 59 Wash. 2d 159 (1961), *cert. den.* 370 U.S. 937.

In the instant case there was no showing, or even allegation, that the assessment of use tax on the receipt and use of processed data in any way burdens interstate commerce by placing it at a disadvantage as compared to intrastate commerce. On the contrary, R.C. 5741.02(C)(2) expressly prohibits the assessment of use tax on the use of property, when the acquisition of the property, if made in Ohio, would not be subject to the sales tax.

Similarly, there is no issue of multiple taxation by Ohio and another state. Nowhere in its jurisdictional statement has the appellant even suggested that it has been or would be subject to tax on the transaction in another state. Furthermore, the Ohio statute specifically exempts property from the use tax to the extent that sales or use tax has been paid to another jurisdiction. R.C. 5741.02 (C)(5).

As for the fact that the data is processed on a computer located outside Ohio and communicated to the appellant via interstate telephone lines, such fact does not preclude an assessment of use tax on the receipt and use in Ohio of the processed data. This Court has already upheld a state's assessment of use tax on use in that state, even though the property was not purchased in the state.

See, for example, *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941), in which the Court considered Iowa's attempt to apply its use tax to the respondent's mail order business, conducted directly between customers in Iowa and the respondent's mail order houses outside the state. The Court upheld the application of the Iowa tax, observing in part as follows at p. 363:

> In passing on the constitutionality of a tax law "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Commission,* 286 U.S. 276, 280, 52 S.Ct. 556, 557, 76 L. Ed. 1102, 87 A.L.R. 374; *Southern Pacific Co. v. Gallagher,* 306 U.S. 167, 177, 59 S. Ct. 389, 393, 83 L.Ed. 586; *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 61 S. Ct. 246, 250, 85 L. Ed. 267, 130 A.L.R. 1229, decided Dec. 16, 1940. *The fact that under Iowa law the sale is made outside the state does not mean that the power of Iowa "has nothing on which to operate." Wisconsin v. J.C. Penney Co., supra. The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is conserned, "has been withdrawn from the arena of debate." Henneford v. Silas Mason Co.,* 300 U.S. 577, 583, 57 S. Ct. 524, 527, 81 L.Ed. 814; *Southern Pacific Co. v. Gallagher, supra.* It is one of the well-known functions of the integrated use and sales tax to remove the buyers'

> temption "to place their orders in other states in the effort to escape payment of the tax on local sales." *Henneford v. Silas Mason Co., supra,* 300 U.S. at page 581, 57 S. Ct. at page 526, 81 L. Ed. 814. As pointed out in that case (300 U.S. at page 582, 57 S. Ct. at page 526, 81 O. Ed. 814), *the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is "upon the privilege of use after commerce is at an end."* And see *Southern Pacific Co. v. Gallagher, supra. Use in Iowa is what is taxed regardless of the time and place of passing title* and regardless of the time the tax is required to be paid. *Cf. McGoldrick v. Berwind–White Coal Mining Co.,* 309 U.S. 33, 39, 60 S. Ct. 388, 393, 84 L. Ed. 565, 128 A.L.R. 876. (Emphasis added)

See also *General Trading Company v. Tax Comm'n.* 322 U.S. 335 (1944), and *National Graphic Society v. California Board of Equalization,* 430 U.S. 551 (1977), to the same effect.

For its part, however, the appellant has attempted to characterize this as an unapportioned tax on its use of computer time, as well as terminals and programs. Thus, it argues that the tax is on an interstate activity, namely, the use of an out-of-state computer. There is no basis for this argument. To be sure the assessed base charge covers a variety of costs incurred by EDS in providing data-processing for the appellant, including the cost of running its computer in Dallas, Texas. However, as the Board of Tax Appeals expressly found, the activities

of EDS under its transaction with the appellant were substantially identical to those considered and held taxable in earlier cases; and the product of those activities (i.e., the processed data) is received and used by the appellant in Ohio.

This is not a case in which the appellant has a divisible contract for the preparation of programs, the use out-of-state of a computer, and the use in-state of terminals. There is no billing based on computer time. Rather it is a billing for the performance of all activities necessary to process the appellant's data. Thus, the appellant was not merely buying computer time; it was paying EDS to perform data-processing. To this end EDS also prepared the necessary programs for use on the computer in Dallas. Indeed, as noted above, the appellant has no employees in Dallas. The fact then that the appellant's employees in Ohio may use a terminal to communicate interstate with EDS and retrieve processed data in no way precluded the assessment, because, as the Board noted, this was a data-processing transaction and the use tax was on the appellant's receipt and use of the print-outs in Ohio. To use the words of this Court in *Nelson v. Sears, Roebuck & Co., supra,* "the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is upon the privilege of use after commerce is at an end."

In arguing then that Ohio has unconstitutionally assessed an unapportioned use tax on the use of a computer located out of state, the appellant is really disputing the nature of the assessment and the use on which it is based. This is not a federal question, but a question of fact and of state law as applied to that fact. It can only be viewed as a federal question if the Board's findings of

fact are disturbed.[1] This is not the purpose of an appeal to this Court. On the contrary, this Court will decline to review state court judgments which rest on independent and adequate state grounds. *Fay v. Noia,* 372 U.S. 391 (1963). The factual and legal character of the transaction under Ohio laws provides such grounds and there is no reason for this Court to undertake further review.

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[1] Even the Ohio Supreme Court will not substitute its judgment for that of the Board of Tax Appeals on questions of fact. *Financial Computer Services, Inc. v. Lindley, supra.*

CONCLUSION

For the reasons set forth above the appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the decision of the Ohio court.

Respectfully submitted,

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APPENDIX

Ohio Revised Code Section 5741.02

(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property, as follows:

*** *** ***

(C) The tax does not apply to the storage, use, or consumption in this state of the follwoing described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

(1) When the sale of property in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31 of the Revised Code, provided said tax has been paid;

(2) Tangible personal property, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code;

(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within

this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code;

(4) Transient use of tangible personal property in this state by a nonresident tourist or vacationer, or a non-business use within this state by a nonresident of this state, if the property so used was purchased outside this state for use outside this state and is not required to be registered or licensed under the laws of this state;

(5) Tangible personal property upon which taxes have been paid to another jurisdiction to the extent of the amount of the tax paid to such other jurisdiction. Where the amount of the tax imposed by this section and imposed pursuant to section 5741.021 [5741.02.1] or 5741. 022 [5741.02.2] of the Revised Code exceeds the amount paid to another jurisdiction, the difference shall be allocated between the tax imposed by this section and any tax imposed by a county or a transit authority pursuant to section 5741.021 [5741.02.1] or 5741.022 [5741.02.2] of the Revised Code, in proportion to the respective rates of such taxes.

As used in this subdivision, "taxes paid to another jurisdiction" means the total amount of retail sales or use tax or similar tax based upon the sale, purchase, or use of tangible personal property legally levied by and paid to another state or political subdivision thereof, or to the District of Columbia, where the payment of such tax does not entitle the taxpayer to any refund or credit for such payment.

For the purpose of the proper administration of sections 5741.01 to 5741.22 of the Revised Code, and to

prevent the evasion of the tax hereby levied, it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established.

As set forth in Amended Substitute Senate Bill No. 544, effective June 29, 1974, 135 Ohio Laws 483, 518-520.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Motion to Dismiss or Affirm have been served on the appellant by forwarding such copies to Dennis J. Barron, Counsel of Record, to Larry H. McMillin, 2500 Central Trust Center, 201 East Fifth Street, Cincinnati, Ohio 45202, and to Mary Ann Overholt, the Union Central Life Insurance Company, P.O. Box 179, Cincinnati, Ohio 45201, attorneys for appellant The Union Central Life Insurance Company by United States mail, postpaid, this _____ day of January, 1985. I further certify that all parties required to be served have been served.

JAMES C. SAUER
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Assistant Attorney General